United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-1179

To be argued by
WILLIAM F. McNULTY

United States Court of Appeals
FOR THE SECOND CIRCUIT

BERNARD TOBIN, as father and next friend of DONNA ELLEN TOBIN, a minor,
Plaintiff-Appellee-Appellant,

against

LOUIS EMPLOYMENT AGENCY,
Defendant,

BEN J. and JULIUS SLUTSKY, a partnership doing business as NEVELE COUNTRY CLUB,
Defendants-Appellants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS-APPELLEES

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INDEX

Cases Cited

Statute

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Introductory Statement

The defendant co-partners, Ben J. and Julius Slutsky, operate a hotel known as Nevele Country Club in Ellenville, New York.

The above-entitled action was brought in the United States District Court, for the Southern District of New York, to recover damages for an assault committed on the

15-year-old daughter of the plaintiff, Bernard Tobin, by a service employee of the hotel, while she was a guest at the hotel with her parents on July 11, 1970.

Federal jurisdiction is based on diversity of citizenship.

The case was tried before Hon. Richard H. Levet and a jury of six. At the close of the plaintiff's case both sides moved for a directed verdict on the liability issue and the Court directed a verdict in favor of the plaintiff (159a-160a). The issue of damages was thereafter submitted to the jury and the jury rendered a verdict in the sum of $30,000.00 for the injury allegedly sustained by the plaintiff's infant daughter, Donna Ellen Tobin.

The defendants, Ben J. and Julius Slutsky, appeal from the judgment thereafter entered in favor of the plaintiff and against them in the office of the Clerk of the United States District Court, for the Southern District of New York.

The plaintiff cross-appeals from so much of said judgment as reflects the ruling of the Trial Judge directing a verdict in favor of said defendants on the issue of punitive damages. As will hereinafter be demonstrated, however, said cross-appeal was not timely filed.

Questions Presented

The appeal by the defendants, Ben J. and Julius Slutsky, presents the following questions:

1. Did the District Judge err in denying the defendants' motion for a dismissal at the close of the plaintiff's case?

   The Court below impliedly answered this question in the negative (152a-156a).

2. Assuming *arguendo* that the above question was correctly answered in the negative, did the District

Judge err in granting the plaintiff's motion for a directed verdict on the liability issue?

The Court below impliedly answered this question in the negative (157a-158a).

3. Is the $30,000.00 verdict of the jury herein excessive?

The Court below answered this question in the negative (186a).

Facts

Inasmuch as both sides rested at the close of the plaintiff's case (156a), there is no dispute as to the assault on the 15-year-old daughter of the plaintiff, Bernard Tobin, which it is undisputed was committed by a service employee of the hotel named Robert Stevens on the afternoon of July 11, 1970, or as to the circumstances leading up to and surrounding its occurrence.

Mr. Tobin and his wife and daughter, Donna, who lived in a suburb of Cleveland, Ohio (66a), arrived at the hotel of the defendants in Ellenville, New York, on July 7, 1970 (72a), and they left the hotel on July 14, 1970 (67a), three days after the assault on the daughter was committed. Mrs. Tobin went to the hotel because he had previously seen its brochure, which described the establishment as a "family" type of hotel, with "supervision especially good for the children and teen-agers" (68a-69a, 82a). He and his wife and daughter occupied the same room at the hotel but his daughter took all of her meals in a separate dining compartment reserved for children (95a). He paid $500.00 for the family's week's stay at the hotel (69a).

The assault on his daughter, Donna, occurred around 3:15 o'clock on the afternoon of July 11, 1970 (33a-34a). The only witness to the occurrence called at the trial was Donna herself, who was 18 years of age at the time of the trial and was then a student in a nursing school in Akron, Ohio (84a).

On direct examination Donna testified that around 3:00 o'clock that afternoon she returned to the hotel from horseback riding and that, while she was standing in the lobby waiting for the elevator to arrive at the lobby floor, Stevens, whom she had never seen before,* came over and stood alongside of her. When the elevator arrived at the lobby floor, she entered it and Stevens following her into the elevator. He asked her what floor she was going to and she told him that she had "already pushed the button" for her floor (85a-86a). When the elevator started to ascend, Stevens pushed another button and then "pulled out a knife and said if you say anything I am going to slash your throat" (6a). Donna described Stevens as "a big, husky man" who was "sort of fat" and had "dark wavy hair" and "small hands". He was wearing "a custodian's uniform like a workman's uniform" (87a).

Donna testified that Stevens thereafter took her to the top floor of the hotel and, while he was still holding the open knife behind her, forced her to walk down a hall and through an open door and out onto a catwalk on the roof of the hotel (88a-89a). When they reached the catwalk on the roof he told her that he "just wanted to talk to her" and she replied "why did you have to pull a knife on me if you just wanted to talk to me and he didn't say anything" but then started to smoke a cigarette (89a).

According to Donna, when he finished smoking the cigarette, he put his free hand down her shirt and, then, after "just standing there for a while" with his hand down her shirt, "he started to unzip my pants" and "I tried to get away from him and he said if you try to stop me, I am going to kill you and he had a knife to my throat" (91a-92a). She testified that, after this, he "stuck his hand down my underwear and the whole time he had the knife to my throat" and then "he unzipped his pants and he

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* *It is undisputed that Stevens was a new employee that the hotel had hired through the Louis Employment Agency on July 8, 1970, or the day after the Tobins arrived at the hotel* (144a-145a).

exposed himself and he kept telling me not to be scared because he was not hurting me'' (92a). Stevens finally released her and allowed her to proceed to her room after she had assured him that she would not mention the occurrence to anyone (93a-94a).

It was stipulated at the trial that, except for the claim for punitive damages which the Court dismissed on the authority of *Gill* v. *Montgomery Ward & Co.,* 284 App. Div. 36 (3rd Dept.) (48a, 148a-150a), there was no claim for ''special damages'' or even ''physical damages'' but that the sole claim was for ''the mental distress and emotional disturbance'' suffered by Donna as a result of the assault (56a).

No medical proof was offered to support any claim that Donna suffered any kind of psychological injury as a result of the assault and, when the Court asked counsel for the plaintiff how any such injury could be established within medical proof, the only answer that he could give to this pertinent inquiry was that he thought that ''a jury can easily draw'' the necessary connection without medical proof (57a).

No purpose is to be served by burdening the Court with a review of the cross-examination of Donna, which is merely a repetition of her testimony on direct examination, plus a little added detail that is not relevant on this appeal (95a-116a).

The only other witnesses called at the trial were Donna's father and natural guardian, Bernard Tobin, and Shirley Tobin, the girl's mother, neither of whom had any personal knowledge of the assault or the circumstances surrounding its occurrence.

Mr. Tobin testified that, since the date of the assault, Donna has had an ''extreme fear of going on elevators'' and that, after returning to school at the end of the summer of 1970, ''she no longer participated in extracurricu-

lar activities", but his testimony in this regard was stricken out by the Court on the ground that there was no proof of any causal connection between these things and the assault of July 11, 1970 (120a-121a).

Mrs. Tobin testified that, since the assault, Donna has "become a more private person" and has become extremely "frightened", but the Court struck out this latter observation on the same ground (138a-139a).

Although Mr. Tobin was questioned about conversations that he allegedly had with other employees of the hotel relative to Stevens, the Court ruled—and, it is submitted, properly so—that these alleged conversations were not admissible against the owners of the hotel in the absence of proof that the persons with whom the conversations occurred had authority to make admissions against the interests of said owners (118a-119a, 121a-127a).

Similar testimony by Mrs. Tobin with respect to an alleged conversation between herself and a Mrs. Miriam Slutsky was held to be inadmissible on the same ground (135a-136a).

At the conclusion of the examination of Mrs. Tobin the plaintiff read into evidence as a part of his affirmative case portions of the deposition taken on the examination before trial of the owners of the hotel, in which it was established that Stevens was employed by the hotel on July 8, 1970, or only three days before the assault herein was committed, and that he was interviewed by one Alice McDole, the housekeeper of the hotel, for about half an hour before he was employed (144a-145a).

As the Court will see when it examines the Pre-Trial Order herein, it was the contention of the plaintiff that the defendants, Ben J. and Julius Slutsky, breached their "contractual obligation to provide the plaintiff, his wife and daughter decent and respectful treatment while they were paying guests and business invitees at the Nevele

Country Club" (35a); "that the hotel was negligent in its hiring practices in allowing Robert Stevens to be employed at the Nevele Country Club"; and that the hotel was also negligent in its "supervision" of said employee (36a).

Although the plaintiff also joined as a defendant in the action the Louis Employment Agency, the employment agency through which Stevens had been employed, charging said employment agency with negligence in recommending the employment of Stevens to the hotel (36a), the action against said employment agency was discontinued, without costs, at the trial (51a).

The Pre-Trial Order herein states that it is undisputed that Stevens was "referred" to Nevele Country Club for employment by the Louis Employment Agency and that at the time of the assault he had been in the employ of said hotel only since July 8, 1970 (35a).

At the close of the plaintiff's case the defendants, Ben J. and Julius Slutsky, moved to dismiss the complaint herein on the ground that Stevens was not acting within the scope of his authority when he committed the assault on Donna and that his act had not been ratified by his employers and the Court, instead of ruling on the motion, stated that "I am inclined to think, however, Mr. Wolff, and Mr. Eckstein, that there may be some liability here and I am going to determine that over until tomorrow" (152a-153a). The following day the motion was denied by the Court, whereupon both sides moved for a directed verdict and the Court granted the plaintiff's motion for a directed verdict (156a-157a). The Court later advised counsel, "I want to say that the combined efforts of myself and my two clerks have found no case which precludes the proposed action which I heretofore directed" (159a).

Charge on Damage Issue

In thereafter submitting the damage issue only to the jury, the Court charged (176a-177a):

> "Now the plaintiff, Donna Tobin, claims damages for mental distress. And its allied nature. There is no claim for any other damages. With respect to the claim for mental distress, that claim is limited to the actual incident and from the time of the incident to the present.
>
> There is no claim for future mental distress or injuries other than have been referred to already.
>
> These damages, as I have said, are called, in the law, compensatory damages, because they are intended to compensate this plaintiff for the injury done to her. These compensatory damages are not punitive in nature. It isn't intended nor is it permitted for those damages to include punishment or to set an example or anything of that sort.
>
> There is no claim in this case now for anything but compensatory damages. Mental distress may be severe when it is of such intensity and duration that no reasonable person would be expected to endure it. In your consideration of what award for mental distress the plaintiff is entitled to, as I noted above, you must observe the nature of the actions of this employee Stevens together with the effect of such conduct on this minor plaintiff.
>
> Such consideration of the effect on this minor necessarily include humiliation, embarrassment and emotional and mental distress experienced by her and to have occurred.
>
> In this respect you may consider the plaintiff's age at the time of the incident, which was 15."

The defendants took due exception to the portions of the charge wherein the jury was allowed to award the

infant damages "for mental distress and her present day conduct without medical testimony" (182a) and wherein the jury was instructed that "damages follow from mental distress without medical testimony" (182a).

After noting the exceptions of counsel to the charge in the absence of the jury, the Court recalled the jury and then delivered the following supplemental charge (183a):

> "Mr. Foreman, members of the jury, I regret that I had to call you back. I am uncertain as to whether I charged you with respect to one factor which you must consider in connection with your deliberations. As to the damages which you may deal with in this case you can only allow such damages as are proximately caused by the incident in question and proximately caused means that they follow from these acts without any intervening cause of any kind, that is, they are the natural effects in the reasonable consideration of such acts of the man Stevens."

During the course of its deliberation the jury transmitted a note to the Court, inquiring if it could fix a damage figure "that would be free and clear of court costs and attorneys fees or must we set a figure irrespective of those costs", and the Court, after conferring with counsel, instructed the jury that "You must establish a figure that you believe represents the proof by a fair preponderance of the credible evidence of the damages suffered by this plaintiff and pursuant to all of my instructions. Nothing else is to concern you" (184a-185a).

The jury thereafter rendered its verdict in the sum of $30,000.00 for the injury allegedly sustained by the infant, Donna Ellen Tobin (185a).

FIRST POINT

The District Court erred in granting the plaintiff's motion for a directed verdict on the liability issue (157a-159a).

Inasmuch as Federal jurisdiction in this action is based solely on diversity of citizenship and the assault on the infant, Donna Ellen Tobin, occurred in New York, the rights of the parties are, of course, governed by the law of New York.

The leading New York case in this field is *De Wolf* v. *Ford*, 193 N.Y. 397 (1908), 86 N.E. 527, 21 L.R.A., N.S. 860, which was decided by the New York Court of Appeals in 1908, and was followed by this Court in *McKee* v. *Sheraton-Russel, Inc.*, 268 F. 2d 669, decided in 1959.

In *De Wolf* the plaintiff, a female paying guest in the Grand Union Hotel in the City of New York, sought to recover damages for the injuries she sustained when an employee of the hotel forced his way into her room, over her protests, about 1:00 o'clock in the morning, while she was clad only in her nightgown, and addressed vile and insulting language to her and then charged her with immoral conduct in the presence of her brother and another man who were in her room at the time.

In reversing a judgment entered in favor of the defendant on the dismissal of the plaintiff's complaint at the trial, the New York Court of Appeals laid down the rule governing the liability of a hotel to a paying guest in actions of this type. Although recognizing that "For centuries, it has been settled in all jurisdictions where the common law prevails, that the business of an innkeeper is of a *quasi* public character" and that a special relationship therefore exists between an innkeeper and one of his

paying guests (p. 401),* the Court of Appeals nevertheless made it clear that in New York the duty which the law places on an innkeeper or hotel is not an "absolute" one.

In defining the duty which an innkeeper or hotel owes to a paying guest in New York, the Court stated at page 404 of its opinion:

> "One of the things which a guest for hire at a public inn has the right to insist upon is respectful and decent treatment at the hands of the innkeeper and his servants. That is an essential part of the contract whether it is express or implied. The right of a guest necessarily implies an obligation on the part of the innkeeper that neither he nor his servants will abuse or insult the guest, or indulge in any conduct or speech that may unnecessarily bring upon him discomfort or distress of mind. The innkeeper, it is true, is not an insurer of the safety, convenience or comfort of the guest. But the former is bound to exercise reasonable care that neither he nor his servants shall by uncivil, harsh or cruel treatment destroy or minimize the comfort, convenience and peace which the latter would ordinarily enjoy if the inn were properly conducted, due allowance being always made for the grade of the inn and the character of the accommodations which it is designed to afford."

It will thus be seen that—under the rule laid down by the New York Court of Appeals in *De Wolf*—which still constitutes the law of New York in the field of innkeeper or hotel liability to paying guests, the criterion of liability is the failure of the innkeeper "to exercise reasonable care" for the safety, comfort or treatment of the guest, after due al-

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* *Unless otherwise indicated, all page references in this Brief to quotations from New York opinions refer to the official New York Reports.*

lowance has been made for "the grade of the inn and the character of the accommodations it is designed to afford."

It is submitted that the question of whether or not this standard has been met necessarily presents a question of fact for the jury.

The rule laid down in *De Wolf* was later applied by the New York Court of Appeals in *Boyce* v. *Greeley Square Hotel Co.*, 228 N.Y. 106 (1920), 126 N.E. 647, which appears to be the last reported decision by the New York Court of Appeals that has any direct bearing on the issue presently before this Court.

In *Boyce* v. *Greeley Square Hotel, supra,* an employee of the defendant hotel likewise made an unjustified and forcible entry into the room assigned to the female plaintiff and addressed her with vile, insulting and abusive language and arrested her husband who was there at the time and removed him from the room. The only issue before the Court in that case, however, was whether, under the holding in *De Wolf,* the plaintiff was entitled to recover damages for the bodily injuries allegedly resulting from her mental stress and anguish. In rejecting the defendant's claim that the plaintiff was not entitled to recover for such bodily injuries, the Court held that the Trial Justice did not err in allowing the jury to determine whether these bodily injuries proximately resulted from the wrongful act of the defendant's employee.

If there could be any doubt that the Trial Judge in the case at bar erred in directing a verdict in favor of the plaintiff on the liability issue herein, instead of submitting this issue to the jury as one of fact—which, it is submitted, he clearly was required to do under the holding of the New York Court of Appeals in *De Wolf* v. *Ford, supra,* this doubt is dispelled by the holding of this Court in *McKee* v. *Sheraton-Russell, Inc.,* 268 F. 2d 669 (1959), 86 N.E. 527, 25 L.R.A. 545, which recognized *De Wolf* as the leading New York case in this field.

In *McKee* the female plaintiff arrived at the defendant's hotel shortly after midnight on Saturday, September 4, 1954, and was assigned a room, with a bath. When she retired the following Sunday night, she locked the door of her room and placed a "Do Not Disturb" sign on the outside knob of the door. The following Monday morning she arose about 6:45 o'clock and entered her bathroom. When she reentered her bedroom, undressed, however, she discovered the bell boy, who had escorted her to her room when she arrived at the hotel, crouched near the end of her bed. She attempted to cover herself and tried to get the boy to leave the room, but he remained there from twelve to twenty minutes addressing suggestive remarks to her and, before he left the room, he advanced toward her with his arms outstretched. Shortly after he left the room, he returned and tried to persuade the plaintiff not to tell anyone what had happened. The plaintiff claimed that the occurrence aggravated an existing urinary ailment.

The case was tried before District Judge Murphy and a jury in the Southern District and the jury rendered a verdict in favor of the plaintiff. On appeal to this Court, the defendant contended that the District Court erred in charging the jury that "If you find that the employee of the defendant entered the plaintiff's room without her permission nor for any justifiable reason, such entry of the room is sufficient to make the defendant liable."

In reversing the judgment appealed from, this Court, writing through Circuit Judge Waterman, held that "we believe the charge imposes too strict a duty on the hotel", citing as authority for its holding in this regard, *De Wolf* v. *Ford, supra,* and then quoting the portion of the opinion of the New York Court of Appeals in *De Wolf* hereinabove set forth on page 11 of this Brief (p. 671).

The Court further held (p. 671):

> "In the case before us the district court's instruction did not impose the duty of 'reasonable care' spelled

out in DeWolf but, instead, imposed a more rigorous one—that of an absolute duty upon the hotel to protect the guest from any improper disturbance. Hence the defendant is entitled to a new trial.

[2, 3] On the new trial the district court should make clear to the jury that the reasonable care which an innkeeper must exercise for the safety, convenience or comfort of its guest will vary with the grade and quality of the accommodations that the innkeeper offers. It would appear there is agreement that the defendant-hotel holds itself out to be a first-class residential hotel. That circumstance should properly be considered by the jury in determining whether defendant took the precautions that the operation of a first-class residential hotel requires. Thus, for instance, the jury may determine, upon adequate instruction, whether defendant, consistent with the standards of care demanded of such operation, took the proper precautions to safeguard its room keys, and if the jury should believe the defendant did not measure up to those standards it would impose liability upon it under the rule of DeWolf v. Ford."

Although the defendant in *McKee* further contended that a new trial should not be ordered but that a judgment in its favor should be directed "because its liability must be predicated upon facts demonstrating that the bellboy acted within the scope of his employment and, accepting all of the plaintiff's testimony at face, there was no evidence introduced tending to show that the bellboy's conduct was in fact within the scope of his employment", this Court rejected this latter contention, first, on the ground that at the trial the defendant did not move for judgment "notwithstanding the verdict" of the jury in favor of the plaintiff, and, secondly, on the ground that, even though the wrongful act committed by the hotel employee in *De Wolf* appeared to be within the scope of his employment, "the

New York Court of Appeals appears to have construed the rule" it laid down in that case "as extending beyond that particular situation", citing *Stone* v. *William M. Eisen Co.*, 219 N.Y. 205, 114 N.E. 44, L.R.A., 1918B, 291 (pp. 671-672).

In *Stone* a young lady went to the defendant's establishment to have braces fitted to her feet. An employee of the establishment attempted to have sexual intercourse with her while he was examining her, an act which clearly was beyond the scope of his employment.

Although, as this Court noted at page 672 of its opinion in *McKee* that the act of the employee in *Stone* clearly was beyond the scope of his employment, in that case the New York Court of Appeals charged the defendant with liability under the "special relationship" rule it had previously laid down in *De Wolf*, which the New York Court of Appeals stated (p. 209):

> "has also been applied between innkeeper and guest (*De Wolf* v. *Ford*, 193 N.Y. 397, and cases cited.) It applies between bathhouse keepers and their patrons (*Aaron* v. *Ward*, 203 N.Y. 351), and private hospitals and their patients (*Hogan* v. *Clarksburg Hospital Co.*, 59 S.E. Rep. 943-945; *University of Louisville* v. *Hammock*, 106 S.W. Rep. 219. See, also, *Schloendorff* v. *New York Hospital*, 211 N.Y. 125, and *Hannon* v. *Seigel-Cooper Co.*, 167 N.Y. 244, 246.)"

Although Circuit Judge Hand dissented in *McKee*, he stated that he fully concurred in the view of the majority that the judgment of the District Court "must be reversed," but "I do not think that, if the evidence is the same on a new trial the case should be submitted to the jury" because "it appears to me that the New York law does not impose any liability upon an innkeeper for personal maltreatment of a guest by one of his servants, unless the servant was acting within the scope of his authority, or unless the inn-

keeper had not used due diligence in selecting the servant, or in supervising his conduct" (p. 673).

In passing, it should be noted that in *Kline* v. *1500 Massachusetts Avenue Apartment Corp.*, 439 F. 2d 477 (C.A., D.C., 1970), which was an apartment house case, the Court of Appeals for the District of Columbia cited in a footnote at the bottom of page 483 of its opinion the decision of this Court in *McKee* in support of the proposition that in innkeeper-guest cases some courts hold that the contract between the parties merely gives the guest "the right to expect a standard of treatment at the hands of the innkeeper which includes an obligation on the part of the latter to exercise reasonable care in protecting the guest."

As this Court will see when it examines the Record below, even though the "special relationship between the infant, Donna Ellen Tobin, and the defendants, Ben J. and Julius Slutsky, as the operators of the hotel involved herein, may have imposed a very high degree of care on said defendants for the protection of this 15-year-old girl from the type of abuse to which she was subjected by their employee, Stevens, there is not a shred of proof in the Record to support a jury finding that they were in any way remiss in the discharge of this duty.

Under these circumstances, it is submitted that the Trial Judge clearly erred in granting the motion of the plaintiff for a directed verdict on the issue of liability at the close of the plaintiff's case (156a-157a).

It is well settled that a plaintiff moving for a directed verdict is not entitled to such a verdict unless he can show that the evidence, viewed in the light most favorable to the defendant, "would be such that reasonable men could not find for the defendant."

Sotell v. *Maritime Overseas, Inc.*, 474 F. 2d 794, 796 (2 Cir., 1973), and cases therein cited.

Under the hotel liability rule laid down by the New York Court of Appeals in *De Wolf* v. *Ford, supra,* it is difficult to understand how anyone can seriously argue that, if the issue of liability herein had been submitted to the jury, the jury could not have found in favor of the hotel on this issue.

SECOND POINT

Absent any showing that the acts of Stevens were within the scope of his employment or that the hotel failed to discharge the duty of care that it owed to the infant, Donna Ellen Tobin, under *DeWolf* v. *Ford*, 193 N.Y. 397, 86 N.E. 527, 21 L.R.A., N.S. 860, the defendants' motion to dismiss at the close of the plaintiff's case should have been granted (152a-156a).

At the trial of this action there was no proof or even suggestion that Stevens had ever previously engaged in conduct similar to the conduct now complained of or that he had ever previously manifested any sexual abnormalities or had ever previously displayed any vicious propensities or that he had a criminal record of any kind.

He was employed by the hotel on July 8, 1970, which was only three days before the assault herein was committed, through the Louis Employment Agency, a presumably reputable employment agency (144a-145a), and, before he was employed, he was personally interviewed for half an hour by Alice McDole, the housekeeper of the hotel (144a-145a). There is no proof that this personal interview developed anything detrimental to his character or to his employment by the hotel.

In the light of the failure of the Record to disclose that there was anything about the man or his character that made it dangerous for a hotel to employ him or, if there was, that this was known or should have been known to the hotel at the time that he was employed or that the hotel was thereafter negligent in supervising him, it is

difficult to understand how the hotel could possibly have been charged with any lack of care either in the employment or in the supervision of this employee.

Under these circumstances, plus the additional fact that the assault he committed on the infant, Donna Ellen Tobin, on the afternoon of July 11, 1970, clearly did not fall within the scope of his employment, it is submitted that no one can seriously argue that the plaintiff established a *prima facie* case against the operators of the hotel under the rule laid down by the New York Court of Appeals in *De Wolf* v. *Ford, supra,* and applied by this Court in *McKee* v. *Sheraton-Russell, Inc., supra.*

For this reason, it is the contention of the defendants, Ben J. and Julian Slutsky, on this appeal that the Trial Judge erred in not granting their motion for a dismissal at the close of the plaintiff's case (152a-156a).

In passing, it is significant to note that, in opposing the defendants' motion to dismiss, the plaintiff's counsel relied heavily on the holding of this Court in *McKee* v. *Sheraton-Russell, Inc., supra,* and the District Judge stated, "I know the case. I tried it" and "I shall consider that decision fully" (154a). As we read the decision of this Court in *McKee,* if it does anything at all, it mandated a dismissal of the complaint in the case at bar.

THIRD POINT

The $30,000.00 recovery allowed the infant, Donna Ellen Tobin, is grossly excessive and the Trial Judge was guilty of an improvident exercise of his judicial discretion in denying the motion of the defendants to set the same aside on this ground (186a).

In order not to distract the Court's attention from the two major law points raised on this appeal, the discussion of the excessiveness of the $30,000.00 recovery allowed the infant herein by the jury will be as brief as possible.

There is no claim that the infant, Donna Ellen Tobin, was sexually assaulted or that she suffered any other "'physical damages'' or any ''special damages'' as a resut of the indignities to which she was subjected by Stevens. Her sole claim at the trial was for "mental distress and emotional disturbance" (56a). No physician was called to testify that she suffered any psychological injury or that her claimed "mental distress and emotional disturbance" proximately resulted from the indignities to which she was subjected by Stevens when he stuck his hand down her shirt and inside her pants and then exposed himself before her. It should be observed that the girl herself made no claim at the trial that she suffered any psychological injury as a result of Stevens' actions in this regard, disgusting as they were.

The only proof of mental or emotional disturbance allowed at the trial, if it can be characterized as such, was the claim of the infant's mother that since July 11, 1970, her daughter has become "a more private person" (138a-139a).

At the time of the trial the girl, who was then 18 years of age, was a student in a nursing school in Akron, Ohio (84a), which is at least some circumstantial evidence that she was a normal young lady from a psychological point of view.

In the light of the absence of any proof that this young lady suffered any ill effects from the indignities to which she was subjected by Stevens on the afternoon of July 11, 1970, other than the humiliation that might normally flow therefrom, it is submitted that the conclusion is inescapable that the $30,000.00 verdict of the jury in her favor is grossly excessive and out of all reasonable proportion to any damage that she actually sustained. In fact, it is so grossly excessive as to indicate that it includes either an allowance for punitive damages, although the claim for punitive damages was stricken out by the Court (148a-150a), or an

award for attorneys' fees, even though the Court specifically instructed the jury, in response to its inquiry about attorneys' fees, that this was of no concern to it (184a-185a).

FOURTH POINT

The plaintiff's claim for punitive damages was properly dismissed by the Trial Judge (148a-150a). Furthermore, the plaintiff's cross-appeal from said ruling was not timely filed.

It is well settled that punitive damages are not recoverable in an action of this type in New York.

As this Court stated at page 673 of its opinion in *McKee* v. *Sheraton-Russell, Inc., supra*:

> "It seems clear to us that punitive damages cannot be assessed under New York law in cases such as this. The rule is set out in *De Wolf* v. *Ford*, 1908, 193 N.Y. 397, 406, 86 N.Y. 527, 21 L.R.A., N.S., 860. The measure of liability, if any, will be purely compensatory, and not punitive * * *" And confirmation appears in *Boyce* v. *Greeley Square Hotel Co.*, 1920, 228 N.Y. 106, 110. 126 N.E. 647, 649. "[The] purpose of the language in *De Wolf* v. *Ford* was to exclude from the new trial granted the awarding of punitive damages * * *".

In New York it is well settled that punitive damages may not be awarded against an employer "on account of the acts of his employees unless he was in some way implicated in the employee's act."

> New York Jurisprudence, Vol. 14, Damages, § 184, pp. 46-47.

Despite the fact that New York clearly bars any claim for punitive damages in actions of this type, the plaintiff

has seen fit to take a cross-appeal from the ruling of the Trial Judge dismissing his daughter's claim for punitive damages in the case at bar.

Wholly apart from its merits, it is submitted that said cross-appeal should be dismissed on the ground that the appeal was not timely taken.

As the Court will see when it examines the Clerk's Docket Entries herein (1a-5a), the judgment in this action was filed on December 13, 1973, and the Notice of Appeal of the defendants was filed on January 11, 1974. The Cross-Notice of Appeal of the plaintiff, however, was not filed until January 28, 1974, or three days after the time of the plaintiff to file such Cross-Notice of Appeal had expired under Rule 4 of the Federal Rules of Appellate Procedure.

Since the failure of a party to file a timely notice of appeal is jurisdictional, on the oral argument of the appeal herein the defendants-appellants-appellees, Ben J. and Julius Slutsky, will move to dismiss the cross-appeal of the plaintiff on the ground that the plaintiff's Notice of Cross-Appeal was not timely filed.

CONCLUSION

The judgment in favor the plaintiff and against the defendants, Ben J. and Julius Slutsky, should be reversed and the complaint herein should be dismissed, with costs, or, in the alternative, a new trial of this action should be ordered.

Dated: New York, New York, April 8, 1970.

Respectfully submitted,

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376—Affidavit of Service by Mail — The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

United States Court of Appeals for the Second Circuit

Bernard Tobin, et al., vs Louis Employment Agency
Appellant

Ben S. and Julius Slutsky a partnership
doing business as Nevele Country Club,

Defendants-Appellants-Appellees

AFFIDAVIT OF SERVICE BY MAIL

State of New York, County of New York **ss.:**

Bernard S. Greenberg, being duly sworn deposes and says that he is agent for Leo E. Berson Appellants Slutsky the attorney for the above named herein. That he is over 21 years of age, is not a party to the action and resides at 162 East Seventh Street, New Yokk New York

That on the 12th day of April, 1974, he served the within Brief for Defendants-Appellants-Appellees upon Williams, Connolly & Califano and Layton & Sherman attorneys for the above named Plaintiff-Appellee-Appellant

by depositing three true copies to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at 90 Church Street, New York, New York

directed to the said attorneys for the Plaintiff-Appellee-Appellant - Williams Connolly & Califano at 1000 Hill Building, Washington D. C. 20006 and Layton and Sherman, 375 Park Avenue 10022, New York,

N. Y., that being the address within the state designated by them for that purpose, or the place where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 12th day of April 1974

Bernard S Greenberg

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 5509105
Qualified in Delaware County
Commission Expires March 30, 1975